.OTION FILED
AUG 28 1995

No. 94-2135

In the

Supreme Court of the United States

August Term, 1995

CITY OF MORGAN CITY,
Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

Motion to File Amicus Curiae Brief and Brief of Amicus Curiae the Municipal Electric Systems of Oklahoma, Inc. In Support of the City of Morgan City's Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit.

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BEST AVAILABLE COPY

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SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

Motion to File Amicus Curiae Brief and Brief of Amicus Curiae the Municipal Electric Systems of Oklahoma, Inc. In Support of the City of Morgan City's Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit.

MOTION TO FILE AMICUS BRIEF OVER OBJECTION OF OTHER PARTIES

Petitioner Municipal Electric Systems of Oklahoma ("MESO") moves the Court for leave to file an amicus curiae brief pursuant to Supreme Court Rule 37.2.

Consent to filing the amicus brief was granted by Amy J.

Mauser, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington D.C., attorney for the City of Morgan City, and Drew S. Days, III, Esq., Solicitor General, Department of Justice, Room 5143, 10th & Constitution Ave., N.W., Washington, D.C. 20530. These consents are attached hereto in Appendix A.

Consent to filing the amicus brief was declined by James M. Funderburk, Esq., Duval, Funderburk, Sundbery & Lovell, 101 Wilson Avenue, P.O. Box 3017, Houman, LA 70361, attorney for the South Louisiana Electric Association and William E. Hodgkins, Esq., Schwab & Walter, 10636 Linkwood Court, Baton Rouge, LA 70910, attorney for the Cajun Electric Power Cooperative, Inc. These declines to consent are attached hereto in Appendix B.

MESO is an Oklahoma non-profit corporation established in 1971 to provide information and training for 61 municipal electric distribution systems in Oklahoma. MESO has been adversely affected by the decision in *Morgan City* because the United States District Court for the Eastern District of Oklahoma relied on the 5th Circuit's opinion to declare Oklahoma's

expropriation statute invalid. If *Morgan City* is affirmed, MESO members will be unfairly limited in their ability to grow, annex new areas and make improvements to their utility systems.

MESO respectfully asks the Court to grant MESO's Motion without the consent of all parties. This case is of great importance to MESO and the approximately 2000 municipal electric providers in the United States. If not reversed, the 5th Circuit's decision will interfere with municipalities' ability to provide service to their residents and will create a disparity of services to municipal residents.

The 5th Circuit Court of Appeals decision will create two separate classes of similarly situated electric customers inside municipal boundaries. One class is provided with electricity by the municipal electric system and is required to pay state and local taxes based on the kilowatt usage. The other class is the formerly rural residents, who are now municipal residents, but who still have rural electric service. These municipal residents do not have to pay taxes for their electrical service since the rural cooperatives are tax

exempt.

The classification is fundamentally unfair to the electric customers on municipal electric service. The rule allows the rural electric companies to "cherry pick" customers and compete unfairly with municipal electric systems.

MESO, for the reasons above and in its brief, respectfully requests that this Honorable Court allow MESO to file its amicus curiae brief in support of granting the City of Morgan City's petition for a writ of certiorari without the consent of all parties.

AMICUS CURIAE BRIEF

INTRODUCTION

Amicus Curiae the Municipal Electric Systems of Oklahoma, Inc. ("MESO"), submits this Motion and Brief in support of the City of Morgan City's Petition for Certiorari.

The Rural Electrification Act ("REAct") is designed to facilitate the provision of low cost electrical service to rural areas. REAct is intended to operate in conjunction with the state statutory schemes to provide rural consumers with low cost electricity.

In *The City of Morgan City*, reported at 31 F.3d 319 the 5th Circuit Court of Appeals decided a question of federal law previously undecided in this Court. In *Morgan City*, the Court of Appeals erroneously held that REAct preempts a municipalities' power to expropriate the assets and customers of a rural electric cooperative after the municipality has annexed the applicable service territory. The basis for the decision is that the municipality's expropriation of the property securing the REA loan to the cooperative will impair the REA's collateral and will endanger the financial stability and future operations of the cooperative.

The 5th Circuit's decision has created an unnecessary conflict between state and federal law. The decision substantially interferes with the states' rights and the rights of its citizens.

INTEREST OF AMICUS CURIAE

Amicus Curiae, the Municipal Electric Systems of Oklahoma, Inc. ("MESO"), is an Oklahoma non-profit corporation established in 1971 to provide information and training for 61 municipal electric distribution systems in Oklahoma. MESO has been adversely affected by the decision in *Morgan City* insofar as the United States District Court for the Eastern District of Oklahoma relied on the 5th Circuit's opinion to declare Oklahoma's expropriation statute invalid. If *Morgan City* is affirmed, MESO members will be unfairly limited in their ability to grow, annex new areas and make improvements to their utility systems.

SUMMARY OF ARGUMENT

Nothing in REAct shows an intent to preempt state laws providing for expropriation of a rural cooperative's property and customers. In fact, REAct specifically addresses and resolves any possible conflicts between a municipality's expropriation power and the REA's interest in preserving its collateral.

The *Morgan City* decision ignores REAct's built in

protections against impairment of collateral. It ignores the fact that Congress knew such expropriations would occur and expressly provided for them in REAct.

More important is *Morgan City's* creation of two classes of municipal electric customer -- those who pay taxes on electrical service and those who do not. This classification is fundamentally unfair. The tax paying municipal electric customers are required to pay for services used by the non-tax paying municipal customers.

ARGUMENT AND AUTHORITY

PROPOSITION

REACT IS DESIGNED TO WORK WITH THE STATES' RIGHT TO EXPROPRIATE THE PROPERTY OF RURAL COOPERATIVES AND THE ALTERATION OF THIS POLICY CREATES AN UNFAIR TAX BURDEN AND INTERFERES WITH THE GROWTH OF MUNICIPALITIES.

The Rural Electrification Act, 7 U.S.C. § 901 *et. seq.* ("REAct") facilitates the provision of low cost electricity to rural areas. *Public Utility Dist. No. 1 of Franklin County v. Big Bend Elec. Co-op., Inc.*, 618 F.2d 601, (9th Cir. 1980). It does so by

making low interest loans to electrical utilities existing under state law and providing low cost electricity to rural areas. 7 U.S.C. § 904.

A. REAct Anticipates the Expropriation of Rural Electric Cooperative's Property and Customers.

REAct loans are generally secured by the property of the cooperative. REAct protects the Rural Electrification Association's ("REA") security interest by providing that:

> No borrower of funds under sections 904 or 922 of this title shall, without the approval of the Secretary, sell or dispose of its property, rights, or franchises, acquired under the provisions of this chapter, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid.

7 U.S.C. § 907.

REAct must operate within the state regulatory system[1] and

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[1]The regulation of utilities is one of the most important functions traditionally associated with the police power of the states. *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375, 377 (1983). Thus, the legislative history of the Rural Electrification Act makes it abundantly clear that although the REA was expected to play a role in assisting the fledgling rural power cooperatives, it would do so within the

a federal lender must consider the possibility of adverse state action prior to making the loan. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 734 (1979). Specifically, REAct regulations provide that in considering loan feasibility, the REA must determine that the "[r]isks of loss of portions of the borrower's service territory from annexation or other causes will not substantially impair loan feasibility." 7 C.F.R. § 1710.112(b)(5) (1995).

B. State Law Creating Rural Electric Cooperatives and Facilitating the Growth of Municipalities.

Oklahoma, like most states, has enabling legislation providing for the creation and regulation of rural electric cooperatives. *see* 18 Okla.Stat. § 437 *et seq.* The purpose of the Oklahoma Rural Electric Cooperative ("OREC") Act, is to provide electric service to "rural" Oklahoma. 18 Okla.Stat. § 437.2(d). "Rural area" is defined as an area of land located outside the limits of any Oklahoma municipality with a population of 1500 or more

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constraints of existing state regulatory schemes. *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. at

persons.

To help keep rural electric rates low, Oklahoma cooperatives are tax exempt. Each cooperative annually pays a one dollar ($1.00) fee per one hundred persons, to the Oklahoma Tax Commission. Pursuant to the payment of this fee the cooperatives are exempt from all other excise and income taxes. *Branch Trucking Co. v. State, ex rel. Oklahoma Tax Com'n, Okla.*, 801 P.2d 686, 689 (1990). The cooperatives are also exempt from paying sales tax on the sale of electricity. Rural electric customers are exempt from payment of sales tax because, unlike their municipal counterparts, rural customers might be without any electric service. *Branch Trucking Co. v. State, ex rel. Oklahoma Tax Com'n, Okla.*, 801 P.2d at 691. On the other hand, public electric service providers are subject to all of the state and local taxes that are imposed on corporations within the state.

The OREC Act also recognizes that municipalities will often grow to encompass rural areas serviced by rural electric cooperatives. Thus, in order to keep "rural" cooperatives "rural",

the OREC Act provides that when a formerly rural area serviced by an electric cooperative becomes annexed by a municipality with its own electric service, the cooperative must turn over to the municipality its property and customers within the municipality's limits. 18 Okla.Stat. § 437.2(k). In exchange, the municipality must compensate the cooperative for the taking of its property.

C. The Decision in *Morgan City*

In *Morgan City* the 5th Circuit Court of Appeals held that when a municipality annexes a new area it cannot use its powers of eminent domain to acquire the property and customers of REAct funded electric cooperatives. The circuit court held that REAct preempted state law under the doctrine of frustration of purpose. The court explained that if municipalities were allowed to take the property and customers of REAct funded rural cooperatives it would impair the REA's collateral. The court believed that such a taking could seriously endanger the cooperative's ability to pay back the REAct loan and cause the cooperative to go out of business or have to raise its rates. The failure of the cooperative

would leave rural consumers without electricity. Raising rates would deprive the rural customers of low cost electric service. REAct's federal purpose would be frustrated because REAct's purpose is to insure that rural consumers have low cost electric service. Thus, reasoned the court, state laws permitting such takings are preempted by federal law.

The court's goal was protection of the REAct loans made to the rural electric cooperatives. The court found that if municipalities were allowed to use eminent domain proceedings to take the cooperative's property it would endanger the government's security and harm the cooperative's ability to repay the loan. The court's decision moves from a faulty premise to an erroneous conclusion. Congress anticipated and provided for the procedures necessary to protect REAct's loans. Initially, REAct regulations require the REA, in determining the sufficiency of the collateral, to consider "the risk of loss of portions of the cooperative's service territory from annexation or other causes." REAct clearly anticipated that once a rural area is annexed, the

cooperative would no longer provide service to that area. However, rather than prohibit the annexation, Congress opted for preventative measures by taking adequate steps in the beginning to make sure the collateral is adequate and will not become impaired. There is nothing to show that Congress intended to prohibit expropriations.

Additionally, REAct provides that the property securing the loans cannot be transferred without the consent of the REA. Thus, if the taking would seriously impair the REA's security interest the REA can refuse consent to the taking.[2]

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[2] In *Morgan City* the REA objected to the expropriation. This may have been a proper grounds to hold that the expropriation could not be made. However, the 5th Circuit's decision went beyond those grounds for denying the expropriation by holding that such expropriations frustrate federal policy by impairing the collateral and the cooperative's ability to pay its loan. The decision is over-broad and has been relied upon to preempt and invalidate Oklahoma's expropriation statute. In *City of Stilwell, Oklahoma v. Ozarks Rural Electric Cooperative Corporation*, No. 95-7011 In the United States Court of Appeals for the Tenth Circuit, the district court relied on *Morgan City* to hold that the expropriation of Ozark's rural electrical property and customers was barred by the doctrine of frustration of purpose. However, unlike *Morgan City*, in *Stilwell*

When a municipality annexes a rural area the citizens within the annexation are benefitted by a plethora of municipal services previously unavailable to them. As municipal residents they receive municipal water, electric, sewer and trash service. They are protected by the municipal police and fire departments. They can take advantage of the municipality's recreational facilities. All of these services are funded in part by the revenues collected from the municipality's' sale of electricity.

The 5th Circuit's decision directly interferes with the states' power of eminent domain and their right to regulate the means and manner of providing their citizens with electricity. It impairs and impedes the growth of municipalities. The holding in Morgan City makes it undesirable for municipalities to expand and annex formerly rural areas. This deprives the citizens in the rural areas of an opportunity to have the advantages of municipal services, such

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the REA found that its collateral would not be substantially impaired and, therefore, did not object to the expropriation. This broad brush application of *Morgan* is incorrect and this court should review *Morgan* and clarify the scope of the decision.

as water, sewer, trash police and fire protection and recreational facilities.

The Court of Appeals has expanded the scope of federal law far beyond its intended boundaries. While its intent was to enhance the federal laws regulating and protecting rural electric providers, the effect of the decision is to broaden the scope of REAct to include electric providers in municipal areas. The purpose of REAct is clearly violated by REAct funded electric cooperatives providing service in municipal areas.

Important interests of the states and the federal government are effected by the erroneous decision in *Morgan City*. These reasons, discussed in The City of Morgan City's Petition for a Writ of Certiorari, compel this Court to grant certiorari. In addition to the interests discussed by Morgan City, the amicus asks the Court to consider the substantial interference with the states' tax structure and the inequity and unfairness to municipal electric consumers.

The decision in *Morgan City* creates two classes of municipal electric consumers. On the one hand, is the municipal

consumer who pays taxes on their electric services. Then there is the formerly rural, now annexed, municipal consumer, who continues to get electricity from the rural cooperative. The annexed/municipal consumers do not pay any taxes for their electric utilities. This situation is fundamentally unfair considering that by paying taxes the municipal consumers are paying for the services and advantages provided to them by the municipality, while the annexed/municipal consumers, who do not pay taxes, receive the same services at a lower cost. This subsidation of the annexed/municipal consumers at the expense of the municipal consumers is fundamentally unfair and cannot be permitted.

CONCLUSION

REAct is designed to work with, not against, state laws governing rural electric cooperatives. The *Morgan City* decision places REAct and state law in direct conflict -- a state of affairs unintended by Congress when it enacted REAct. The decision in *Morgan City* directly interferes with the growth of municipalities and their ability to provide services to their citizens.

MESO respectfully asks this Court to grant Morgan City's Petition for Certiorari to review and reverse the decision.

Respectfully Submitted,

Larry Dickerson, Esq.
P.O. Box 400
Poteau, Oklahoma 74953
(918) 647-8606
Attorney for Municipal Electric Systems of Oklahoma, Inc.

APPENDIX A

LAW OFFICE OF
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LARRY DICKERSON

August 10, 1995

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10636 Linkwood Court
Baton Rouge, LA 70910

RE: United States Supreme Court Case No. 9402135
City of Morgan City v. South Louisiana Electric Cooperative,et al.

Gentlemen:

Pursuant to Rule 37.2 of the rules of the Supreme Court, the Municipal Electric Systems of Oklahoma (MESO) requests your written consent to MESO'S participation as an amicus curiae in the referenced matter prior to the consideration of the petition for a writ of certiorari. MESO is a non-profit membership organization which represents municipal power authorities operating within the State of Oklahoma. The interests of the membership are affected by the present action. MESO intends to file a brief in support of the petition for a writ of certiorari of the City of Morgan City, such filing to be made on or about August 30, 1995.

We request that you indicate your consent to MESO participation as an amicus by signing and returning this correspondence to the undersigned at your earliest convenience.

Sincerely yours,

Larry Dickerson
Attorney At Law
P. O. Box 400
Poteau, OK 74953
(918) 647-8606

CONSENT TO AMICUS PARTICIPATION
OF THE MUNICIPAL ELECTRIC
SYSTEMS OF OKLAHOMA

Signature of Counsel

City of Morgan City
Name of Client Represented

3/19/95
Date

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

August 17, 1995

Larry Dickerson, Esq.
Attorney at Law
Post Office Box 400
Poteau, Oklahoma 74953

Re: City of Morgan City v. South Louisiana Electric Cooperative, et al., No. 94-2135

Dear Mr. Dickerson:

As requested in your letter of August 10, 1995, I hereby consent to the filing of an amicus curiae brief on behalf of the Municipal Electric Systems of Oklahoma in the above-captioned case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

APPENDIX B

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August 18, 1995

Mr. Larry Dickerson
P. O. Box 400
Poteau, Oklahoma 74953

RE: City of Morgan City v. South Louisiana Electric Cooperative Association, et al

U. S. Supreme Court Case No. 9402135

Dear Mr. Dickerson:

This is in reply to your letter of August 10, 1995. As you know, I represent South Louisiana Electric Cooperative Association. I am afraid that I must respectfully object to your request to file an amicus brief in support of the Writ of Certiorari of the City of Morgan City. As you know, Rule 37.2 of the Rules of the Supreme Court do not favor amicus briefs. Furthermore, the rules require that something new or different be called to the court's attention in the brief and you have not indicated what that could possibly be. Morgan City has filed a very excellent and thorough brief touching on all issues in this case and I cannot imagine what the City of Poteau, Oklahoma, can bring to this case that has not already been briefed.

With kind regards, I am

Sincerely yours,

JAMES M. FUNDERBURK

JMP/c

cc: Mr. Clifton S. Elgarten
Mr. Drew S. Days, III
Mr. William E. Hodgkins
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August 16, 1995

Mr. Larry Dickerson
P. O. Box 400
Poteau, Oklahoma 74953

Re: City of Morgan City v. South Louisiana Electric Cooperative Association, et al
U. S. Supreme Court Case No. 9402135

Dear Mr. Dickerson:

I am writing this letter in response to your letter of August 10, 1995 requesting my consent, pursuant to Rule 37.2 of the Rules of the United States Supreme Court, to your filing an amicus curiae brief in the above referenced matter prior to consideration of the Petition for a Writ of Certiorari. Rule 37.2 of the Rules of the United States Supreme Court provides that an amicus curiae brief submitted prior to the consideration of the Petition for Writ of Certiorari must be submitted prior to the time for submittal of oppositions to the Petition for a Writ of Certiorari. Inasmuch as the time period for submission of oppositions to the Petition for a Writ of Certiorari filed by the City of Morgan City in the above referenced matter has passed, any amicus curiae brief filed on behalf of your client would be untimely under the Rules of the United States Supreme Court. In any event, I am not in a position to consent, on behalf of Cajun Electric Power Cooperative, Inc., to the filing of an amicus curiae brief by you on behalf of your client in connection with the above referenced matter.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

SCHWAB & WALTER

William E. Hodgkins

WEH:sbr
cc: Mr. James M. Funderburk
Mr. Drew S. Days, III
Mr. Clifton S. Elgarten